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Supreme Court of the United States,

OCTOBER TERM, 1903.

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JAMES H. McKENNEY,
Clerk.

No. 63.

THE ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

against

THE DAVIS PROVISION COMPANY AND OTHERS,
Appellees.

BRIEF FOR APPELLEES.

FRANK E. SMITH,
THOMAS F. CONWAY,
Counsel for Appellees.

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Supreme Court of the United States.

ANGLO-AMERICAN PROVISION COMPANY,
Appellant,

against

THE DAVIS PROVISION COMPANY, SMITH M. WEED, FRANK E. SMITH, THOMAS F. CONWAY, GEORGE S. WEED, THE MERCHANTS' NATIONAL BANK OF PLATTSBURGH, and HENRY DAVIS, as Administrator, etc.,
Appellees.

No. 63.
October Term, 1903.

BRIEF FOR APPELLEES.

Appeal by complainant below from a decree of the Circuit Court for the Southern District of New York dismissing bill on the merits.

The suit is brought to procure a set-off of judgments. The complainant seeks to use a judgment rendered in its favor against the Davis Provision Company in Illinois, to pay in part a judgment against it in the courts of New York, in form in favor of the Davis Provision Company, but which is in fact the property of the other defendants.

The theory of the bill is that the two judgments arose out of the same transaction and that the transfer by the Davis Company to the other defendants was without consideration and in fraud of the rights of the complainant.

Defendants originally demurred to the bill for want of jurisdiction, the complainant and the defendant, the Davis Provision Company being both Illinois corporations and there being nothing in the bill to make a case arising under the Constitution or laws of the United States.

The demurrer was overruled and the jurisdiction sustained upon the theory that the law of the State of New York which closes the courts of that State to an action brought by one foreign corporation against another foreign corporation upon a cause of action arising outside the State, in effect deprives the complainant of a right enjoyed by white citizens, and is therefore a violation of the laws of the United States designed to secure equal rights. (Revised Statutes, §1977–1979). The present suit was therefore treated as one brought to redress this deprivation and within the jurisdiction conferred on the Court by the sixteenth subdivision of section 629 of the Revised Statutes. (Opinion of WHEELER, *J.*, overruling demurrer, p. 11).

After the decision of the demurrer defendants answered denying the facts essential to the equity of the bill, namely: that the judgments sought to be set off had their foundation in the same transaction, and that the Davis Company was really the owner of the judgment nominally in its favor.

Complainant replied, and proofs were taken.

The facts established are as follows:

(1). The Anglo-American Provision Company and the Davis Provision Company are both Illinois corporations. The latter company was organized in 1886. It was operated in connection with the Anglo-American Provision Company and Fowler Brothers, Limited, and

its main purpose was to handle and dispose of their products (Record, p. 92).

(2). A large business was done between the two companies, continuing to 1893. After a time the Davis Company, through Henry Davis, its president, assertep that the goods being shipped to it were not in all cases of such quality as it was entitled to receive under existing contracts, and it began making reclamations (p. 95).

(3). These claims were not at first either allowed or rejected by the Anglo-American Company, but held in abeyance, and settlements of account were made between the parties without reference to them (p. 95, 26th finding).

(4). The Davis Company, from its organization in 1886 to 1893, was dominated and controlled by the Anglo-American, a majority of its directors being officers or employees of the latter company (p. 93, 12th finding; p. 100, 42d finding).

(5). In June, 1891, at a meeting of the directors of the Davis Company, a resolution was adopted abandoning a large part of the claims of that company on the Anglo-American, and settling the balance for a trifling sum. Mr. Davis, the president of the company, and the only director who was not also a director of the Anglo-American, dissented and protested (p. 117).

(6). In December, 1892, the Davis Company closed its account with the Anglo-American, and gave it three notes for a balance due it, amounting to $23,546.67, the Anglo-American refusing to allow the back claims (p. 98, 33d finding). After this there was no further dealing between the companies, except for cash (p. 102, 51st finding).

(7). At the annual meeting of stockholders of the Davis Company, held in June, 1893, Anderson Fowler was discarded as a director and Smith M. Weed elected, the Board thereafter consisting of Henry Davis, Smith M. Weed and Robert Stobo (p. 114). This change in its directorate, for the first time, made the Davis Com-

pany independent of the Anglo-American (p. 101, 46th finding).

(8). The notes given by the Davis Company to the Anglo-American in December, 1892, were transferred by the latter company to Fowler Brothers, Limited, and when they came due in 1893 the latter company brought suit thereon in New York. The Davis Company attempted to interpose an answer setting up its claims against the Anglo-American as a counter claim, but through the inadvertence of its attorneys certain provisions of the Code were not complied with and judgment was entered against it as by default in October, 1893, for about $15,000. The Davis Company thereupon paid the judgment so entered against it upon an agreement with Anglo-American and Fowler Brothers, Limited, that such payment should be without prejudice to its claims (p. 101, 48th finding).

(9). The Davis Company was compelled to borrow money to enable it to pay the judgment so obtained against it by Fowler Brothers, Limited. It applied to the Merchants' National Bank of Plattsburgh, which agreed to loan it $13,500, provided the defendant Weed "would go on the paper" and security be given him (p. 53, 54). This Weed agreed to do upon an agreement with Henry Davis, as President of the Davis Company, that the claims of the Davis Company against the Anglo-American and also certain stock of a milling company should be assigned to him as security (Davis, p. 49; Wever, p. 53, 54; Weed, p. 61). Three notes were made, upon one of which Weed was maker and on the others indorser, amounting to $13,500, the proceeds thereof credited to the Davis Company in the bank and a draft drawn against it which was used to pay the judgment recovered by Fowler Brothers (p. 50). Of this loan $10,000 is still unpaid and renewal notes to which defendant Weed is a party are now held by the bank (p. 55–63). The milling company stock, which was part of the security given on

the loan, has proved to be worthless (p. 51–55). Formal written transfer of the claims in question to Weed was not made till May, 1895.

(10). In November, 1893, the Anglo-American brought a second action against the Davis Company, this time in Illinois, seeking to recover for certain goods sold and delivered, etc. (p. 28). The Davis Company defended the action, pleading among other things as a set-off, certain of its claims against Anglo-American (p. 31). This plea of set-off was withdrawn in December, 1898 (p. 33), and in January, 1899, the Anglo-American obtained judgment for $5,049.98, which is the judgment sought to be used as a set-off in this suit (p. 3[illegible], 34).

(11). In December, 1893, the Davis Provision Company, through its new Board of Directors, repudiated as a fraud on the company the action of its former Board in 1891, abandoning and settling the claims of the company against the Anglo-American and authorized legal proceedings to be taken to enforce those claims (p. 117, 118).

(12). In June, 1894, the Davis Company brought an action in the courts of New York, against Anglo-American and Fowler Brothers, Limited, to recover certain of the claims amounting to $25,229.77. Both defendants appeared and answered. They denied generally the claims asserted, and alleged various defenses, but did *not* set up or assert any set-off or counter claim whatever, although at this time the action brought by the Anglo-American was pending in Illinois (p. 41; 9th par. of Stipulation). The claims which were asserted in this action ranged in point of time from 1888 to 1892 (Bill of Particulars, p. 85–90).

(13). In May, 1895, and while the action was pending, the Davis Company made a formal written assignment of all its claims against the Anglo-American, including those sued on in the pending action above mentioned to defendant Weed. This assignment declares on its face

that it is to secure him for the liabilities of the Davis Company to him (p. 35–38; 2d par. of Stipulation). It was executed and delivered on May 27, 1895, the day it bears date (p. 69). On the same day, and after the delivery of the paper, receivers were appointed for the Davis Company in both Illinois and New York (p. 69, 121–128).

(14). The action then pending in New York was continued in the name of the original plaintiff (as authorized by the law of that State) and such proceedings were had that on December 13, 1895, judgment was rendered nominally in favor of the Davis Company, and against Anglo-American Company and Fowler Brothers, Limited, jointly, for $7,892.44 damages, and against Anglo-American alone for $615.38 damages, and against both defendants for $1,349.80 costs (p. 104, 105). The defendants in that judgment appealed. The Appellate Division of the New York Supreme Court struck out $1,653.72, and as modified affirmed it October 2, 1897. Defendants appealed to the Court of Appeals, which affirmed the judgment in July, 1900 (p. 39). This is the judgment against which complainant seeks to set off its Illinois judgment.

(15). In November, 1899, the Anglo-American brought an action at law in the New York courts against the Davis Company alone on the Illinois judgment, seeking simply to recover as damages the amount thereof, to wit, $5,049.98. The Davis Company demurred upon the ground that the cause of action—the Illinois judgment—did not arise within the State, and therefore, both parties being foreign corporations, the court had no jurisdiction. This demurrer has been so far sustained (Bill, p. 2, 3. Answer, p. 14).

There was no proof as to the financial condition of the Davis Company prior to May, 1895, when it became openly insolvent. It did refuse to pay the notes held by the Anglo Company in 1893, but that was because it believed it had a good counter claim,

and when it lost the opportunity to assert that claim and judgment went against it, that judgment was promptly paid (p. 47). Other notes held by the Anglo-American in 1893 were paid, and when the Davis Company sued the Anglo in New York in June, 1894, the latter had no unpaid notes of the Davis Company, though it did have other claims then in suit in Illinois. No default of the Davis Company in payment of its business paper is shown until May 22, 1895 (p. 121).

Briefly stated, the Court below found as matter of fact that these claims in question were formally assigned to Weed, May 27, 1895; that such assignment was in pursuance of a prior oral agreement made in October, 1893, by which Weed loaned his credit to the Davis Company to the extent of $13,500 upon the security of the claims; that the transaction was in good faith and done to prevent the insolvency of the Davis Company; that the Anglo-American got the money which was so raised and that the New York judgment afterwards entered upon these claims nominally in favor of the Davis Company was actually in favor of Weed (opinion of Coxe, *J.*, pp. 130, 131).

As matter of law the court below decided that the Illinois judgment obtained by the Anglo-American Company in 1899 against The Davis Company cannot be used to pay the New York judgment obtained by Weed against the Anglo-American in 1895.

The assignments of error are numerous but they seem to raise only two questions.

FIRST—*Were the claims of the Davis Company, sued on in the New York action, actually and in good faith assigned to Weed, for a valuable consideration.*

SECOND—*If so, does Weed hold the judgment entered in the name of the Davis Company free from complainant's equity of set off, if such equity existed before the assignment.*

Before considering the questions raised relating to the merits there is a preliminary question as to the jurisdiction of the Circuit Court.

The appellees originally challenged that jurisdiction but their demurrer was overruled. Having succeeded in establishing their defense on the merits they might well enough be content to concede the jurisdiction of the Court which has decided in their favor. The question, however, is one which we assume the Court will consider and determine for itself, even if not raised by Counsel.

M. C. & L. M. R. R. Co. *vs.* Swan, 111 U. S., 379, 382.
Giles *vs.* Harris, 189, U. S., 475, 501.

Jurisdiction of the Circuit Court was maintained on the ground that this is a suit brought under the Civil Rights title of the Revised Statutes—section 1979—to redress the deprivation of the right to set off the Illinois judgment. (Opinion of Wheeler, p. 11).

Jurisdiction of suits brought under that title is in terms conferred on the Circuit Courts by R. S., section 629, paragraph 16.

If the demurrer were now before the Court for argument the following questions, among others, would arise:

1. Are sections 1977 and 1979 of the Revised Statutes, still in force?

See—

Holt *vs.* Indiana Mfg. Co., 176 U. S., 68.
Giles *vs.* Harris, 189 U. S., 475, 485.

2. Are they within the constitutional power of Congress to enact?

3. Is the right to set off judgments a "civil right," such as is intended to be secured by them?

Holt *vs.* Indiana Mfg. Co., 176 U. S., 68.

4. Is the right to sue in the courts of New York upon causes of action arising outside the State, as *e. g.*, upon an Illinois judgment, a "right, privilege or immunity," secured by the Constitution and laws, to a corporation foreign to the State of New York?

Blake *vs.* McClung, 172 U. S., 239.
Robinson *vs.* Oceanic Steam Nav. Co., 112 N. Y., 315.
Eingartner *vs.* The Illinois Steel Co., 94 Wis., 70.

5. Is a corporation entitled to claim the protection of section 1979?

(*a*) Is it a "citizen of the United States?"

(*b*) Is it a "person within the jurisdiction thereof?'

Blake *vs.* McClung, 172 U. S., 315.

6. In overruling the demurrer to the jurisdiction, WHEELER, *J.*, said (p. 12):

> "The plaintiff has been deprived of its right "of offset under color of that statute of the State, "and this suit is not at all framed to review in "any way the judgment by which this was done, "but for independent relief under these laws of "the United States provided for because of that "statutory deprivation."

If the denial of the right to set off the judgments in question be the denial of a civil right secured by the Constitution and laws so as to give rise to a suit in equity for redress under section 1979 of the Revised Statutes then, as the deprivation of such right is made criminal by section 5510 of the Revised Statutes, it would seem to follow that a crime has been committed. Who is the criminal?

If the Court should be of opinion that the suit is not within the jurisdiction of the Circuit Court as one

brought to redress a deprivation of civil rights, then is it one arising under the Constitution and laws of the United States, and so within the jurisdiction.

The bill alleges the unconstitutionality of section 1780, of the New York Code of Civil Procedure. But the case has been decided without touching that question.

In *Manhattan R'way Co.* vs. *New York*, 18 Fed. Rep., 195, WALLACE, *J.*, says:

> "A case does not arise under the Constitution "or laws of the United States unless it cannot "be decided without deciding a Federal ques- "tion."

The settled rule seems to be that to make a case within the jurisdiction upon this ground it must appear from the facts well pleaded in the plaintiff's statement of his own claim that the case is one arising under the Constitution or laws of the United States. The determination of a Federal question must be a necessary ingredient of the case as made by the bill.

Tennessee *vs.* Union & Planters' Bank, 152 U. S., 454.

New Orleans *vs.* Benjamin, 153 U. S., 411, 424.

McCain *vs.* Des Moines, 174 U. S., 168, 181.

Houston & Texas R. R. *vs.* Texas, 177 U. S., 66.

Whether the complainant is entitled to the set-off it seeks seems to depend upon general principles of equity and not upon any law of the United States or any provision of the Constitution. If so, then the case does not arise under the Constitution or laws of the United States.

Passing now to the merits.

ARGUMENT.

FIRST.

The assignment of the claims against the Anglo-American Company and Fowler Brothers, Limited, to defendant Weed was valid and effectual and for a valuable consideration.

The errors alleged by appellant attack the assignment to Weed both in fact and in law.

I. Errors of Fact Alleged.

(1) The second, third and fourth specifications challenge the fact of the transaction between Davis on the one side and Weed and the bank on the other, by which the bank agreed to loan, and did loan, to the Davis Company $13,500 on Weed's credit, the latter being secured by the claims then known to all parties to be asserted by the Davis Company against the Anglo. But the transaction, as found by the court, was proved by the testimony of the three parties who took part in it, and no testimony to the contrary was produced.

(2) The fifth and sixth specifications relate to the supposed knowledge on the part of Weed of the cross-claim then (*i. e.*, Oct., 1893), existing in favor of the Anglo-American and thereafter sued on by it in Illinois. But the court below was unable to find any proof of such knowledge in the record and none has been pointed out by the learned counsel for appellant. It is true that Weed became a director of the Davis Company in June, 1893, but this is hardly enough to charge him with actual knowledge of all prior transactions of the company. The largest part of the claims which went into the Illinois judgment did not accrue until August 19, 1893 (p. 29). But even if Weed were chargeable with knowledge of the fact that such claims

existed, it would not impeach the good faith of the transaction of October, 1893. The purchaser of a non-negotiable chose in action takes it subject to the equities then existing in favor of the debtor, but as we shall show below there was no equity of a set-off then existing in favor of the Anglo-American. Knowledge or ignorance on Weed's part was not material.

(3) The seventh specification so far as it questions the fact of the assignment is of course answered by pointing out the paper of May 27, 1897, and the seal of the Davis Company. The validity of that deed will be considered below.

(4) The eighth specification is similar to the seventh.

(5) The ninth and tenth specifications assert that because the Davis Company exercised acts of dominion over the claims after the agreement of October, 1893, therefore that agreement was invalid. The acts principally relied on, were pleading some of the assigned claims as a set-off in the Illinois action, and suing upon them in the New York courts. But the claims were only assigned to Weed as security and were on their face largely in excess of the amount for which he had a lien on them (p. 127). That the Davis Company exercised control over the claims, to the extent mentioned does not seem inconsistent with the fact that it had given Weed the lien upon them which he claimed.

(6) The twelfth specification seems to imply that the act of Weed in loaning his credit to the Davis Company was done for his own personal advantage; that he and not the Davis Company benefited by it There is nothing in the evidence to sustain this view of the case. Weed never claimed to hold the assigned claims except as security for the amount advanced the Davis Company on his credit.

We submit that there is no error in the record relating to the fact of the agreement of October, 1893, giving Weed a lien on the claims in question, or the formal performance of that agreement by the writing of May 27th, 1895.

II.—Errors of Law Alleged.

(1) The fourth assignment of error alleges that certain evidence received was incompetent. Granting that the copies of the notes produced were secondary, yet the error if any was harmless as the fact of the loan by the bank of $13,500 was otherwise established and the form of the paper was not material. The objection was not taken at the time the witnesses were examined (p. 48). Had it been the original notes would have been produced.

(2) The eighth assignment of error challenges directly the validity of the assignment to Weed.

The grounds upon which this is done seem to be:

(*a*) Want of authority in Davis to make it.

(*b*) Disability on the part of Weed to receive it.

(*c*) The insolvency of the company.

(*d*) Exercise of dominion over the subject matter by the assignors.

(a) *Davis had power to make the assignment in question.*

The power of Davis, who made the agreement of October, 1893, pledging the claims in question to Weed, and who executed that agreement by signing the paper of May 27, 1895, seems to be questioned, because there is no regular record of a resolution of the directors authorizing it.

The agreement for the loan was negotiated by Henry Davis, the president and treasurer of the Company (p. 48, 115). He was also, as president, the general manager of the Company at Albany and Plattsburgh (By-laws, p. 112, sec. 13). The ordinary course of business had been to leave to him the full management and control of the Company's affairs in the East, *i. e.*, New York, Albany and Plattsburgh. He attended to the finances of the Company, borrowing money and giving security (p. 72, 73). The directors met irregularly and at long intervals (p. 72). There can be no question of

the power of Mr. Davis, under the facts disclosed, to borrow the money and to make the agreement for security which it is shown he did make.

Peck *vs.* Dexter S. P. & P. Co., 164 N. Y., 127.

Mathews *vs.* Hardt, 79 App. Div. (N. Y.), 570.

In *Morawetz on Corporations*, sec. 509, it is said, quoting from a California decision:

> " The result of the cases seems to be, that where " the management of the affairs of a corporation is " intrusted to a managing agent, he has power to " assign the choses in action of the corporation to " its creditors, either in payment of, or as security " for the payment of, a precedent debt of the cor- " poration, without express authority from the " Board of Directors, and an assignment so made " is valid."

Power to pledge as security for a present loan would seem to exist *a fortiori*.

The corporation received the benefit of the loan. It was used to pay the judgment of this very complainant. A majority of its directors participated in the transaction. Plainly the Davis Company cannot question the validity of the agreement on which the loan was made. *A fortiori*, complainant, who is a stranger, cannot question it.

Castle *vs.* Lewis, 78 N. Y., 131, 135.

The subsequent formal written assignment to Weed of the claims in suit against the Anglo-American must be referred back to the original agreement to give it, and the rights of the parties under it are the same as if it had been given at the moment when the Bank,

relying upon Weed's credit, fortified by this security advanced the money.

Paulding *vs.* Chrome Steel Co., 94 N. Y., 334, 340.
Castle *vs.* Lewis, 78 N. Y., 131, 135.
Ledyard *vs.* Phillips, 58 Mich., 204, 208.
Matter of Rogers Co., 79 App. Div. (N. Y.), 419.

It matters not, therefore, if the evidence of the authority given Davis, as president of the Company, to make the written assignment to Weed, be informal or even defective, because the act done was one which the corporation was under a prior legal obligation to do. But we deny that evidence of proper corporate authority is lacking. By the by-laws of the Company all instruments in writing required the signature of the president and treasurer (p. 112, sec. 14). Davis filled both offices (p. 115). At the meeting of the directors held in Chicago in December, 1893, the president of the Company was authorized to assign and transfer any and all of the claims or causes of action of the Davis Company against Anglo-American or Fowler Brothers, and a formal resolution to that effect is among the corporate records and is in evidence (p. 118). At the same meeting an executive commitee was created consisting of the president and vice-president. Weed was vice-president. The general management of the business of the Company subject to the control of the full Board was vested in this committee, and it was authorized to hold its meetings outside the State of Illinois (p. 119). The testimony of Weed is that there was a meeting of the directors held at Plattsburgh shortly before the execution of the formal assignment to him, at which Mr. Davis and himself were present, the third director, Mr. Booth, having been notified but not attending. The full executive committee was present even if the full board was not. A resolution was passed directing the president of the Company to

execute a formal transfer of the claims to Weed (p. 62). Davis also swore that the execution of the assignment was pursuant to the order of the board of directors of the Company (p. 37). There is absolutely nothing tending to overcome this testimony except the fact that the record book of the Company contains no record of the meeting of the executive committee, or of the directors subsequent to June, 1893 (p. 71). The record of the meeting of December, 1893, was outside the regular record book, and was proved from the proceedings had in the action in the State court (p. 73). The reason for the defective condition of the record book is that Mr. Stobo, the original secretary, was removed from office at the meeting of December, 1893, and he thereupon took possession of the record book and refused to surrender it to his successor until compelled to do so by legal proceedings (pp. 72, 116, 120). It being shown that the record book contained no record of the meeting of the directors or executive committee in May, 1895, the parol evidence given by Weed was competent.

Mining Co. *vs.* Anglo-Californian Bank, 104 U. S., 192, 194.

The written assignment to Weed is under the seal of the corporation, attested by its president and proved in the manner required by the New York Law (Real Property Law, sec. 258). The corporate seal accompanied by this proof is alone *prima facie* proof of corporate authority.

Trustees of Canandarqua Academy *vs.* McKechnie, 90 N. Y., 618, 629.

There is no affirmative evidence whatever to overcome this *prima facie* proof. On the contrary, the records of the corporation show express authority given to its president to assign and transfer the property in question in December, 1893, and this authority was renewed at a meeting held only a few days before

the deed was executed, but of what was done at this latter meeting the proof is only by parol.

It may be objected that Weed was a director, and could not act as such to authorize a transfer to himself. Assuming that he took part in the meeting held just before the formal transfer to him was made—and unless he did there was no quorum—the corporate action was not thereby rendered void but, at most, voidable. No one can question it for this reason but the corporation itself or its stockholders. Clearly the corporation could not avoid the act, because it was in pursuance of the prior contract by which it was bound. And even if the contract for security could be avoided, it would only be done on condition of restoring to Weed or the Bank the money advanced on the faith of it.

Duncomb *vs.* N. Y., H. & N. R. R., 84 N. Y., 190, 199.

(*b*) *Disability of Weed to deal with the Davis Company.*

It is said that Weed was a director, and therefore prohibited from dealing with the Company.

But a director may lend money to his corporation and take security for it.

Twin Lick Oil Co. *vs.* Marbury, 91 U. S., 587.

Converse *vs.* Sharpe, 161 N. Y., 571.

Illinois Steel Co. *vs.* O'Donnell, 156 Ill., 624.

(*c*) *Insolvency of the Davis Company.*

The statutes of New York prohibiting transfers by insolvent corporations are invoked.

There is no finding or evidence that the Davis Company was insolvent in October, 1893. Conceding insolvency on May 27, 1895, when the formal assignment was made, yet as it was made in performance of the

prior agreement of October, 1893, it is not within the condemnation of section 48 of the Stock Corporation Law of New York.

Matter of Rogers Co., 79 App. Div., 419.
Paulding *vs.* Chrome Steel Co., 94 N. Y., 334.
Miller *vs.* Miller Knitting Co., 23 Misc. (N. Y.), 404.

There is nothing in the New York statute which prevents even an insolvent corporation from borrowing money and giving a valid security for it. It is only acts done in contemplation of insolvency, and which result in giving a preference, which are forbidden.

Dutcher *vs.* Importers & Traders Bank, 59 N. Y., 5.
O'Brien *vs.* East River Bridge Co., 161 N. Y., 539, 548.

The Illinois law is the same. A director of an insolvent corporation may lend it money and take security which will be valid against its creditors.

Illinois Steel Co. *vs.* O'Donnell, 156 Ill., 624.

No question arises under the Bankrupt Law as all transactions took place before 1898.

(*d*) *Exercise of dominion by assignee.*

It is said The Davis Company used the claims as a set-off in Illinois, and sued on them in its own name, thereby exercising dominion over them. But this exercise of dominion by a pledgor over the thing pledged does not defeat the pledge or render it fraudulent as to creditors of the pledgor.

Stackhouse *vs.* Holden, 66 App. Div. (N.Y.), 423.

The doctrine of *Christmas* vs. *Russell* (14 Wall, 69) is invoked. But the alleged acts of dominion were before the transfer to Weed of the legal title to the

claims. In the assignment of May 27, 1895, no right of revocation or control was reserved to the Davis Company.

But we submit that the doctrine of *Christmas* vs. *Russell* and kindred cases does not apply to an agreement to give security based on a present valuable and adequate consideration.

See Matthews *vs.* Hardt, 79 App. Div. (N. Y.), 570.
Matter of Rogers Construction Co., 79 App. Div. (N. Y.), 419.
Risley *vs.* Phenix Bank, 83 N. Y., 318.

The agreement, therefore, between the Davis Company by its president and general manager on the one side and the Bank and Weed on the other, that the claims in question should be held as security for the loan and to protect Weed against his indorsement, was valid. Weed and the Bank, having executed it on their part by advancing the money thereby acquired a good equitable lien on the subject-matter—the claims against the Anglo-American—and became entitled in equity to have the same specifically enforced.

Jones on Liens, secs. 77, 78.

In every aspect of the case therefore Weed and the bank acquired the equitable title to the claims in question by force of the agreement of October 1893, and this equitable title was made a legal title in Weed by the formal assignment of May 27, 1895. The judgment subsequently entered in the name of the Davis Company was the property of Weed. It is true that both the claims assigned and the judgment obtained on them were held as collateral security for the debt due the bank, $10,000, but this debt exceeds the amount of the judgment in question, together with the amount realized on the Mark J. Davis judgment, $3,026 (pp. 39, 40, 69), when the costs and expenses of the litigation, which must be first paid out of the fund, are considered.

The defendant Weed and the bank are therefore entitled to be considered as purchasers in good faith and for value of the claims in question, and of the judgment sought to be in part extinguished by set-off.

SECOND.

The case made by the bill is for a set-off of judgments.

The bill alleges that the complainant is a creditor of the Davis Company by force of the judgment which it has obtained in Illinois. This judgment was not obtained until January, 1899. At that time the opposing judgment was and for more than three years had been the property of defendant Weed under the agreement of October 1893 and the assignment to him of May 27, 1895. The right to set off one judgment against another does not arise until the entry of judgment in the second action. It follows that if before the entry of the second judgment the opposing claim or judgment is assigned in good faith to a third person, the latter will hold it free of any right of the judgment debtor to set off his subsequent *judgment*.

Graves *vs.* Woodbury, 4 Hill (N. Y.), 559.
Spencer *vs.* Barber, 5 Hill (N. Y.), 568.
Mackey *vs.* Mackey, 43 Barb. (N. Y.), 58.
Prouty *vs.* Swift, 10 Hun (N. Y.), 232.
Roberts *vs.* Carter, 38 N. Y., 107.
Perry *vs.* Chester, 53 N. Y., 243.

In *Mackey* vs. *Mackey* (43 Barb., 58) it is held:

"The equity to have one judgment set off against "another cannot arise until judgment is actually "recovered in the second action. An assignment "made previous to that event, transferring a legal, "or even an equitable title, to the demand will "have the effect of preventing the right of set-off "from accruing."

Prouty vs. *Swift & Burt* (10 Hun, 232) was a suit to set off judgments. The facts were much the same as in the present case. Each party had obtained a judgment against the other, but the claim of Swift and the judgment thereon had been assigned to Burt before Prouty got final judgment. The Court says (p. 234):

> "The assignment, therefore, vested in Burt an "absolute right, and when the judgment of the "plaintiff herein was finally entered against Swift, "the latter had no judgment in his favor, for, as we "have seen, it had been assigned long before to "the defendant Burt. It had, indeed, never been "the property of Swift, for, as we have seen, the "report of the Referee, on which it was based, was "transferred and became the property of Burt be- "fore it was taken up. As the right to set off judg- "ments does not accrue until judgment has been "perfected, the *bona-fide* assignment, previous to "judgment, will cut off the right to have such "judgment set-off against the party in whose favor "it was rendered (Perry *vs.* Chester, 53 N. Y., "243; Mackey *vs.* Mackey, 43 Barb., 58; Roberts "*vs.* Carter, 38 N. Y., 107)."

The rule that the right to set-off one judgment against another does not arise until the second judgment is perfected, is a necessary corollary of the rule that a judgment merges the cause of action on which it is recovered, and is itself a new cause of action. The settled rule is:

> "The cause of action, though it may be examined "to aid in interpreting the judgment, can never "again become the basis of a suit between the "same parties. It has lost its vitality; it has "expended its force and effect. All its power "to sustain rights and enforce liabilities has "terminated in the judgment or decree. It is

" ' drowned in the judgment ' and must henceforth
" be regarded as *functus officio.*"

Freeman on Judgments [4th ed.] Sec. 215.

It follows that if an action be brought against a defendant who has a cross-claim which he might set-off and the defendant, instead of using his claim as a set-off, brings a cross action thereon and gets judgment first, he cannot use that judgment as a set-off in the first action, for it did not exist when the action was brought; neither can he set-off his original claim, for it is merged in the judgment.

Lowell *vs.* Lane, 33 Barb. (N. Y.), 292.
Ives *vs.* Goddard, 1 Hilton (N. Y.), 434.
Mizell *vs.* Moore, 7 Ired. Law (N. C.), 255.
Andrews *vs.* Varrell, 46 N. H., 17.
Barber *vs.* Baker, 70 Mo. App., 680.

The complainant recognized the rule that a *bona fide* assignment before judgment prevents a set-off, and sought to avoid it by alleging that the assignment to Weed was without consideration; in fraud of its rights and void so far as it was concerned. The allegations of the bill in this respect are denied by the answer; the proofs wholly failed to sustain them, and the Trial Court has found against them.

It will, of course, be urged that the assignee of a non-negotiable chose in action takes it subject to all equities. This may be conceded, but the equities which a debtor may assert against the assignee are only those which existed in his favor *at the time of the assignment.* If the *judgment* against the Davis Company had been actually entered in favor of complainant at the time of the assignment to Weed—either in October, 1893, or May, 1895—it may be that he would have taken subject to the right to set off that judgment. But when Weed became the owner of the claim against complainant there was no equity then existing to set off judgments, for complainant had no judgment.

It will no doubt be argued in reply that the complainant's *claims* against the Davis Company existed and were in suit and that an equity to set off the subsequent judgment may be based upon them. The answer is that no such case is made by the present bill. The complainant rests upon its judgment and upon that alone. All claims which were in suit are, of course, merged in the judgment, and the bill relies on that as the foundation of the suit. Had the complainant alleged its original claims against the Davis Company and tendered to defendant Weed an opportunity to contest them, then perhaps an equity founded upon them might have been asserted. Instead of doing this the complainant by relying on its judgment forecloses inquiry into the merits. Complainant cannot be allowed to say as against defendant Weed, that its claims have been liquidated and established by judgment, and at the same time assert against him an equity not founded on that judgment. Of course, the Illinois judgment establishes nothing as against Weed. He is not a party to it. He claims nothing under it. His rights, whatever they are, were vested in him long before it was rendered. If now these rights are to be prejudiced, by reason of equities alleged to have existed anterior to the judgment—that is the claim upon which the judgment was founded—it can only be done by giving him an opportunity to contest the validity of the claim on which the equity is asserted. But the present suit is not framed for any such purpose. It asserts reciprocal judgments merely, and the judgment, which is legally and equitably the property of defendant Weed, cannot be extinguished by setting off against it a judgment to which he is not a party, and which was not in existence when his judgment was recovered.

THIRD.

No case is made either by the pleadings or the proofs to restrain the enforcement of defendant's judgment at law.

The bill alleges that the Illinois judgment in favor of complainant arose out of the same transactions as those which gave rise to the judgment now held by defendants (p. 3). The answer denies this and alleges that it arose out of separate and distinct contracts (p. 14, par. IV.).

. The proofs sustain the answer.

A comparison of the bill of particulars in each action will show the demands asserted by the one party to have been entirely separate and distinct from those set up by the other (see statement in Illinois action, p. 29; Bill of Particulars in New York action, p. 85).

Taking the complainant's own version of the matter, however, and it is plain that the cause of action sued on in Illinois might have been set up as a counter claim in the New York action.

The statute law of New York relating to set-off is now contained in the Code of Civil Procedure under the name of counter-claim, as follows:

> Sec. 500. The answer of the defendant must contain:
>
> 1. * * * * *
>
> 2. A statement of any new matter constituting a defense or counter-claim.
>
> Sec. 501. The counter-claim specified in the last section must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or in a proper sense, against the person whom he represents, and in favor of the defendant, or one or more of the defendants between whom and the plaintiff a separate judgment may be had in the action:
>
> 1. A cause of action arising out of the contract or transaction set forth in the complaint

as the foundation of the plaintiff's claim or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action

The general rule is:

"A Court of Equity does not interfere with "judgments at law, unless the complainant has "an equitable defense of which he could not avail "himself at law, or had a good defense at law "which he was prevented from availing himself "of by fraud or accident, unmixed with negligence "of himself or his agents."

Gray, *J.*, in Knox County *vs.* Harshman, 133 U. S., 154.

Savage *vs.* Allen, 54 N. Y., 458.

Pond *vs.* Harwood, 139 N. Y., 111.

This rule applies when the equity upon which relief is asked grows out of a set-off which might have been but was not interposed in the action at law. In such case the party is held to have waived his right to set-off and cannot afterwards assert it.

Hendrickson *vs.* Hinckley, 17 How. U. S., 443.

U. S. Bung Mfg. Co. *vs.* Armstrong, 34 Fed. Rep., 94.

Greene *vs.* Darling, 5 Mason, 201.

In the case first cited, Hinckley sued Hendrickson at law. The latter had a good set-off, but thinking his other defense was sufficient did not interpose it. Hinckley got judgment. Hendrickson then filed his bill in equity to have the set-off allowed, alleging that Hinckley was a non-resident of the State and had no property therein. A demurrer to the bill was sustained.

CURTIS, *J.*, says (p. 446):

"It is suggested that Courts of Equity have an "original jurisdiction in cases of set-off, and that

"this jurisdiction is not taken away by the statutes "of set-off, which have given the right at law. "This may be admitted, though it has been found "exceedingly difficult to determine what was the "original jurisdiction in equity over this subject "(2 Story Eq., 656, 664). But whatever may have "been its exact limits, there can be no doubt that "a party sued at law has his election to set off his "claim, or resort to his separate action. And if he "deliberately elects the last, he cannot come into "a court of equity and ask to be allowed to make "a different determination, and to be restored to "the right which he has once voluntarily waived. "Similar considerations are fatal to the plaintiff's "claim for relief, on the ground that defendant "resides out of the State. * * * When the "complainant elected not to file these claims in "set-off in the action at law, he knew that defend- "ant * * * resided out of the State. If that "fact was deemed by the complainant insufficient to "induce him to avail himself of his complete legal "remedy, it can hardly be supposed that it can "induce a court of equity to interpose to create "one for him. The question is not merely whether "he now has a legal remedy, but whether he has "had one and waived it. And as this clearly ap- "pears, equity will not interfere."

Neither does the insolvency of the creditor in the action at law change the rule.

Beach, Equity Jurisprudence, sec. 665.
Barker *vs.* Elkins, 1 John Ch., (N. Y.), 465.
Wolcott *vs.* Jones, 4 Allen (Mass.), 367.
Sayre *vs.* Harpold, 33 W. Va., 553.
Greene *vs.* Darling, 5 Mason, 201.
Howe *vs.* Sheppard, 2 Sumner, 409, 414.
Jackson *vs.* Bell, 31 N. J. Eq., 554; affirmed, 32 N. J. Eq., 411.

In *Wolcott* vs. *Jones* (4 Allen, 367), the Court held:

> "A bill in equity cannot be maintained to re-
> "strain the collection of an execution against the
> "plaintiff in favor of the assignee of an insolvent
> "debtor on the mere ground that the plaintiff has
> "claims against the debtor which might be the
> "subject of set-off, there being no averment to
> "show that the plaintiff, for any reason, could not
> "have availed himself of his right of set-off in the
> "action in which the judgment against him was
> "recovered."

The case of *Sayre* vs. *Harpold* (33 W.Va., 553), was very similar to the case at bar.

Sayre had a three months' note made by Harpold in 1878. A cause in action accrued in favor of Harpold against Sayre in 1879, and in 1883 he brought suit on it in Missouri. The action was removed to the Federal court. Sayre defended, denying all liability but saying nothing of the note. Harpold got judgment in the Federal court and then brought an action on it against Sayre in West Virginia. Sayre then filed a bill to restrain the action and to have his note allowed as a set-off. Harpold was a non-resident and insolvent.

Held that the bill should be dismissed, SNYDER, *J.*, saying, p. 558:

> "The question then arises: Does the fact that
> "the plaintiffs in the judgment at law are insolvent
> "entitle the plaintiff here to relief which he would
> "not be entitled to if they were solvent? If the
> "claim had been a payment instead of a set-off, the
> "solvency or insolvency of the plaintiff in the
> "judgment would be wholly immaterial, because
> "it would be lost in either event. If that is true
> "in regard to a payment it is equally true in re-
> "spect to a set-off, for the cases make no distinction
> "between payments and set-offs. The default of the

" party complaining and not the circumstances of
" the plaintiff in the judgment is the criterion upon
" which equity refuses relief."

Unless, then, there was some legal obstacle which prevented the Anglo-American Company from setting up its claim against the Davis Company in the action at law in the state court, it is not now entitled to relief in equity by reason of that claim.

(*a*) The bill of complaint in the present suit alleges no such obstacle. On the contrary, by alleging that the claims which were the foundation of each action at law arose out of the same transaction, it impliedly asserts that the one might have been set-off against the other.

(*b*) The fact that the Anglo sued first in Illinois does not change the rule. An action pending in the courts of another state cannot be pleaded in abatement to an action between the same parties for the same cause here.

Bowne *vs.* Joy, 9 John, 221.
Douglas *vs.* Phenix Insurance Co., 138 N. Y., 209, 218.
Stanton *vs.* Embree, 93 U. S., 548.

(*c*) The fact that the New York action was against both the Anglo-American Company and Fowler Brothers, Limited, did not prevent the assertion of a counter claim by the Anglo. A separate judgment might have been and in fact was recovered in that action against the Anglo (Code, sec. 501). More than this, the present complaint alleges that the judgment in the action at law went against both corporations, because, as regards the Davis Company the two were identical.

FOURTH.

The right, if any, which the Anglo-American Company had to reduce its liability on the claims of the Davis Company against it, by reason of a cross liability in its favor, did not survive the assignment of the Davis Company's claim to Weed, and the entry of judgment thereon.

There are two points of view from which to consider this proposition; *first*, assuming the claim of the Anglo-American to have been available as a counter claim in the action brought by the Davis Company; *second*, assuming that it was not so available.

(1) AVAILABLE AS A COUNTER CLAIM.

It is manifest on this assumption that the Anglo, by omitting to set up the claim in its own favor as a counter claim, waived the right to the remedy it now seeks, and the case is that presented by the above point, namely, that a Court of Equity will not enjoin a judgment to let in a set-off which might have been but was not pleaded at law.

That the right to a set-off may be waived is clear. It seems equally clear that it is waived by not pleading it.

Gutchess *vs.* Daniels, 49 N. Y., 605.
U. S. Bung Mfg. Co. *vs.* Armstrong, 34 Fed. Rep., 94.
Greene *vs.* Darling, 5 Mason, 201.

In *Gutchess* vs. *Daniels* (49 N. Y., 605), there was an express agreement waiving the set-off, but the language of the Court applies equally to an implied waiver.

ALLEN, *J.*, says (p. 608):

"The right of set-off in the case of cross debts "is given by law for the benefit of parties having

" mutual dealings and to avoid a multiplicity of
" actions. It is a proceeding by which equity can
" be done between suitors at law. But, like every
" other benefit or privilege conferred by law, it
" may be waived by the party entitled to it. In
" courts of law a defendant may set off any claim
" which he has against the plaintiff, which is within
" the statute of set-off, or bring an independent
" action, at his election. * * * All that the
" party waiving the right to set off a demand
" against the claim of the plaintiffs, in an action in
" which it is allowable, or (by) omitting to exer-
" cise it, loses, is that one remedy for the collec-
" tion or satisfaction of his debt."

In *United States Bung Manufacturing Company* vs. *Armstrong* (34 Fed. Rep., 94), the plaintiff was indebted to the Fidelity Bank on a note, and, after the insolvency of the bank, paid it to Armstrong as its receiver. It then brought suit to have its own claim against the bank allowed as an equitable offset. Defendant's demurrer was sustained, JACKSON, *J.*, saying :

" Complainant's right of set-off was waived or
" abandoned by its payment of the note described
" in the bill. * * *

" If complainant had intended to rely upon its
" debts against the Fidelity National Bank as a set-
" off against its note, it should have declined pay-
" ment of the note, stood suit thereon, and set up
" its counter-claim as a set-off. * * *

" It " (the bill) " discloses nothing more than the
" existence of cross-demands or independent debts
" which could have been set off at law if complain-
" ant had asserted its right to do so at the proper
" time and in the proper mode. Having volun-
" tarily waived or abandoned this legal right and
" remedy by paying the note to avoid being sued

" thereon, it presents no case for equitable relief
" by way of equitable set-off."

In the present case the Anglo-American had full knowledge of its own claims against the Davis Company when the latter company began its action in the state court. It also had knowledge of the insolvency of the latter company before any of the claims on either side had passed into judgment and had ample time to apply to the court to relieve it from its ommission to plead its counter-claim. Had it then doubted the sufficiency of its other defense, or its ability to collect its judgment in Illinois, it ought to have applied to amend its pleadings (see Fabricotti *vs.* Saunitz, 3 Sandf., Sup. Ct., 743). But it elected to prosecute its own action in Illinois, and ought now to be held to that election. Illinois is the home of both corporations. By its judgment in that State it has secured whatever benefits may accrue to a local creditor by reason of a judgment.

(2) Not Available as a Counter-claim.

If the claims of the Anglo-American could not have been interposed as a counter-claim to defeat or reduce the claims of the Davis Company, then it is not easy to see what equity to a set-off existed which would attach to the judgment thereafter entered against the Anglo, and which, when entered, was both legally and equitably the property of Weed. The rule seems to be established, both in equity and at law, that if A has a demand against B, which is in suit, and B has a cross-demand against A, but of such nature that it is not then available as a set-off or counter-claim to A's suit, whether because it has not yet matured or is unliquidated or sounds in tort, and A, actually and in good faith assigns his cause of action, the assignee will hold such claim, and the judgment subsequently

entered on it, free from any claim of set-off on the part of B.

Hackett *vs.* Connett, 2 Edw., Ch. (N. Y.), 73.
Graves *vs.* Woodbury, 4 Hill (N. Y.), 559.
Prouty *vs.* Swift, 10 Hun (N. Y.), 232.
Keep *vs.* Lord, 2 Duer. (N. Y.), 78.
Myers vs. Davis, 22 N. Y., 489.
Roberts *vs.* Carter, 38 N. Y., 107.
Perry *vs.* Chester, 53 N. Y., 240.
Martin *vs.* Kunzmuller, 37 N. Y., 397.
Fera *vs.* Wickham, 135 N. Y., 223.
Pardo *vs.* Osgood, 2 Abb. Pr., N. S. (N. Y.), 365.
Nash *vs.* Hamilton, 3 Abb. Pr., N. Y., 35.

The case of *Hackett* vs. *Connett*, 2 Edw., Ch. 72, is in point. It was a bill in equity to procure the set-off of judgments. Hackett got two judgments for costs against Connett on the dismissal of two chancery suits. While the chancery suits were pending, and before any costs had accrued, Connett sued Hackett at law. After the decree for costs had been rendered against Connett, and before judgment in his action at law, Connett assigned his claim against Hackett, and judgment was subsequently entered in favor of the assignee. Hackett then sued to set off the judgments. Connett was insolvent.

McCoun, *V. C.* (p. 76):

> "Another difficulty existed in relation to a set-
> " off in the suit at law. Hackett's right to costs
> " in the chancery suits had not then become per-
> " fect by decree so as to form debts in his favor
> " until after the commencement of the suit at law
> " against him. In order to make a debt or demand
> " a set-off it must have existed at the time when
> " the suit was commenced. * * * But the
> " moment a judgment was obtained in the action a

" right to a set-off founded upon the equity of the " statute, attached; unless the assignment to Alcock " of which notice had been given prevented it. The " chose in action was capable of being assigned " * * *. The consideration for the assignment " * * * was a prior indebtedness to the de- " fendants Price & Sears for costs and professional " services * * * and an old debt to the de- " fendant Alcock * * *; and the avowed object " of the assignment was to secure and pay their " debts. * * *

" Even although we assume the assignment to " have been made in good faith, yet it must be ad- " mitted that the assignee could only take subject " to whatever rights or equities then existed in " favor of Hackett against Connett. What, then, " were those rights and equities? The defendant " at law was at liberty to make the same defense to " the action as he could have made if no assign- " ment had been executed. * * * But he could " make no set-off. The right had not attached. " Although by this time the costs in Chancery * * * " might have ripened into a debt, still the forms of " law did not permit him to make it a set-off upon " the trial. Nor did it operate *pro tanto* as pay- " ment or compensation for the damages claimed " in the suit. Neither had he then any right in " equity to a set-off. The Court of Chancery ex- " tends the principle no further than a court of law " under the statute of set-off (Duncan *vs.* Lyon, 3 " John Ch., 351). Although Chancery has some- " times exercised the power of decreeing a set-off " before or independently of the statute, it has " only done so where mutual debts existed and " where there was either an express or implied " agreement of stoppage *pro tanto* or mutual credit. " Here at the time of the assignment there were " not mutual debts, much less a mutual credit."

In *Graves* vs. *Woodbury*, 4 *Hill*, 559, the case of *Hackett* vs. *Connett* was adopted and followed.

COWEN, *J.*, says, page 562:

> "The case is, I think, within the principle of "Hackett *vs.* Connett. There the defendant had a "demand against the complainant which was in- "capable of being countervailed by a set-off, "because such demand was unliquidated. Pend- "ing suit he assigned it to Alcock, who obtained "judgment. Whereupon the complainant filed his "bill to compel a set-off of the judgment against "previous decrees for costs in his favor on the "dismissal of bills filed by Connett. Vice-Chan- "cellor McCoun held that the assignee having "taken the demand before any right to set off the "decrees existed, had acquired a claim paramount "to that of the assignor; and on that ground "denied the relief prayed for."

The Hackett case was again followed or quoted with approval in Pond *vs.* Harwood, 139 N. Y., 111, 119.

The rule is the same in other States.

Hovey *vs.* Morrill, 61 N. H., 9.
Ledyard *vs.* Phillips, 58 Mich., 204.
Ullman *vs.* Kline, 87 Ill., 268.
Ames *vs.* Bates, 119 Mass., 397.

In the New Hampshire case cited Morrill sued Hovey and pending the suit assigned his claim to pay an existing debt. Morrill was insolvent at the time and Hovey held his note. After judgment in Morrill's suit against Hovey the latter sued Morrill on the note and got judgment and brought this suit for a set-off. The set-off appears to have been allowed, but on the theory that the assignment was colorable only and a fraud on plaintiff.

ALLEN, *J.*, says (p. 13):

"In exercising the power of setting off mutual "judgments the real and not the nominal par- "ties are considered; and if one judgment has "been, in good faith and for a valuable considera- "tion, assigned to a third person before applica- "tion for a set-off is made, such third person is "the real party in interest, and no set-off can "ordinarily be allowed."

It has also been applied in the Federal courts.

Howe *vs.* Sheppard, 2 Sumner, 409.

In the case cited STORY, *J.*, said (p. 418):

"Where there are mutual debts which may be "set off in law or in equity, I take it to be clear "that the right of set-off is extinguished by a *bona* "*fide* assignment of one of the debts."

The cases are thus summed up in *Freeman on Judgments*, section 427:

"But if a judgment has been in good faith and "for a valuable consideration assigned to a third "person before application for a set-off is made, "such a third person is the real party in interest, "and no set-off can ordinarily be allowed."

FIFTH.

No case is made by the proofs for a set-off under the general rules of equity.

Relief in equity by way of set-off, and independent of statute, is not ordinarily granted in cases of merely reciprocal demands, even though one party be insolvent. It must, in addition, be made to appear that the two demands arose out of the same transaction, or were so connected that the party seeking the set-off may justly claim that he gave credit to the other by reason of the existence of his own debt, and under such

circumstances that an agreement to use the one debt to pay the other may fairly be implied.

Story, Equity, sec. 1435.
Snell, Principles of Equity (12th English Ed.), 596.
Scott *vs.* Armstrong, 146 U. S., 499, 507.
Hatch *vs.* The Mayor, 82 N. Y., 436, 442.
Greene *vs.* Darling, 5 Mason, 201.
Gordon *vs.* Lewis, 2 Sumner, 151.
Howe *vs.* Sheppard, 2 Sumner, 412.
Gordon *vs.* Lewis, 2 Sumner, 628.

The general doctrine is stated in *Snell's Principles of Equity* as follows (12th Eng. Ed., p. 595).

> "As regards connected accounts * * * the "law always was that the balance only of the ac- "counts was recoverable both at law and in equity; "and that was a virtual set-off between the "parties; and such set-off was available at law, "even as against agents (such as factors) trading "ostensibly as principals; and the Courts of "Equity followed in general the Courts of law, "as regards set-off, so that if there was no connec- "tion between the demands the rule in equity was "as at law—that is to say, if the accounts were "*unconnected* there was no set-off either at law or "in equity, but if the demands were connected "there was a set-off. However, the Courts of "Equity went beyond the law, and by virtue of "their general jurisdiction granted relief in the "cases even of reciprocal independent debts *pro-* "*vided there was a mutual credit*—that is to say, in "all cases where there was an existing debt due "to one party and a credit by the other party "founded on and trusting to such existing debt as "the means of discharging it. * * * But the "mere existence of reciprocal debts without such "mutual credit was not even in a case of insol- "vency sufficient to have sustained a set-off."

In *Scott* vs. *Armstrong* the controversy was between a solvent bank and the receiver of an insolvent bank. The receiver had recovered judgment in the Federal Court at law against the solvent bank. A set-off claimed by the solvent bank had been rejected because of the rule of Federal practice excluding equitable defenses in actions at law. The solvent bank then filed its bill for a set-off. It was held that the action of the law court in rejecting the set-off was right, but *because the claim of the solvent bank arose out of the same transaction as* that on which it had been cast in judgment equity would allow the set-off.

FULLER, *C. J.*, says (p. 507):

> " Courts of equity frequently deviate from the
> " strict rule of mutuality when the justice of the
> " particular case requires it, and the ordinary rule
> " is that where the mutual obligations have grown
> " out of the same transaction, insolvency on the
> " one hand justifies the set-off of the debt due upon
> " the other."

In *Carr* vs. *Hamilton*, 129 U. S., 252, 262, the question arose between the trustees of an insolvent life insurance company and a policy-holder who had borrowed money of the company on mortgage. Suit was brought to foreclose the mortgage and the policy-holder asked to set off the value of his policy, and his claim was allowed on the theory that when a policy-holder borrows money of his insurer it will be presumed that he does so on the faith of the insurance and in the expectation of meeting his own obligation with the obligation of the company to him.

In *Hatch* vs. *The Mayor*, 82 N. Y., 436, an award of damages had been made against the City for opening a street. Assessments had been laid in favor of the City upon the same property apparently for benefits done the same property by the same opening. The City had applied the assessments in part payment of the

damages. The party entitled to the damages sued to recover them.

FOLGER, *C. J.*, says, p. 441:

"There is another consideration that has pressedus much. That is whether there did not exist in the City a right to a stoppage of the money applied by it to the payment of assessments upon the premises or some of them. * * * It is to be inferred that the work for which these assessments were laid was for the benefit of this property for the damage to which this award was made. It is probable that one of them was for the benefit of this property by the very change of grade for the damage by which this award was made. The first impulse is to say that there is a natural equity that the benefits done to the property should be paid for from the award for the damages done to it. But equity goes upon fixed principles; and it does not allow a set-off or a stoppage unless this is a recognized rule of law or a recognized equitable reason that requires it. The data furnished by the case are not full and definite enough to say that such a rule or reason exists.

* * * * * *

"Equity does not interfere to declare a set-off or a stoppage unless there is one debt contracted on the faith of another; or an agreement between the parties that the one should be discounted from the other; or that there is a rule of law on which to base its action; or some intervening equity that renders the interposition of the Court necessary for the protection of the demand."

In *Greene* vs. *Darling*, 5 Mason, 201; *Gordon* vs. *Lewis*, 2 Sumner, 151; *Howe* vs. *Sheppard*, 2 Sumner,

412, and *Gordon* vs. *Lewis*, 2 Sumner, 628, this equitable doctrine of set-off was much considered by Mr. Justice STORY. In the last of these cases he says (p. 634):

> "To justify a court of equity in allowing a set-
> "off there must be some original or intervening
> "equity between the parties beyond the mere fact
> "of mutual debts. There must be a mutual credit
> "founded on a subsisting debt on the other side,
> "or an express or implied agreement for a set-off
> "of mutual debts."
>
> * * * * * *
>
> "The sole equity now set up is the insolvency
> "of John Gordon. But I am not satisfied that
> "mere insolvency alone constitutes a ground for
> "the interference of the Court. On the contrary,
> "it appeared to me in *Howe* vs. *Sheppard*
> "(2 Sumner, 628) there was no sufficient authority
> "to establish that doctrine."

The complainant in framing its bill in the present suit recognized this rule and sought to comply with it by alleging that the debts on which the respective judgments were recovered both arose out of the same transaction. But the proofs do not sustain the pleading. The "transaction" out of which the debt due complainant principally arose was a sale of grain in 1893—$2,400—(p. 29). The claims of the Davis Company extend back to 1888, and practically all accrued before 1893 (p. 85).

It is true that Mr. Fowler, president of complainant, testified in response to the direct question that the one judgment arose out of the same transaction as the other (p. 43). The question was clearly incompetent, and on cross-examination he explained that what he meant by the same transaction was the running account between the two companies (pp. 44, 45).

The manner in which the two companies did business with each other might have afforded some justification for a claim of "mutual credit" were it not for the way in which the claims of the Davis Company were treated by the Anglo-American. The latter company refused to recognize them; attempted through its control of the Davis Company to compel the latter to abandon them and refused to consider them when in December, 1892, the two companies had a settlement. In short, the complainant has from the beginning denied and disputed the validity of the claims made by the Davis Company, and which are the foundation of the present judgment. Mr. Fowler as a witness in this suit has testified that at the time of the transaction which gave rise to the action in Illinois he knew that the Davis Company made claims against the Anglo-American, but that the latter company denied their validity and refused to recognize them (p. 45).

Under these circumstances it would be idle to claim that the complainant gave credit to the Davis Company because of the existence of these claims, or that any just expectation on its part will be disappointed if compelled to pay in money a debt which it has always refused to recognize.

Even if the insolvency of the Davis Company would be ground for equitable interference as between the original parties, yet it cannot be urged as an equity against Weed because at the time his rights accrued the Davis Company was *not* insolvent. Assuming that Weed took subject to all equities, yet there was then no equity of set-off on the ground of insolvency.

Insolvency of the debtor is no equity on which to found a set-off as against the debtors' assignee, unless it existed at and before the assignment.

Henderson *vs.* McVay, 32 Ala., 471.
Robbins *vs.* Holley, 1 Mon. (Ky.), 191.

SIXTH.

The case made by the bill of complaint wholly fails.

The complainant is, of course, entitled to relief only according to the allegations of its bill. The theory of the bill is that the debts which underlie the judgments sought to be set off, both arose out of the same transaction; that the transfer to the defendant Weed was without consideration and with full knowledge of plaintiff's rights; and that it is void as against the complainant (p. 4). The effect of these allegations, if established, is that the Davis Company is still the owner of the judgment. The answer is under oath, and denies absolutely these charges of the bill (pp. 15, 16). These denials are responsive, and they can be overcome only by the testimony of two witnesses on behalf of the complainant, or by one witness and corroborating circumstances.

Story, Equity, sec. 1528.
Vigel *vs.* Hopp, 104 U. S., 441.
Southern Development Co. *vs.* Silva, 125 U. S., 247.

The complainant has wholly failed to comply with this rule. Only one witness was sworn on its behalf—Anderson Fowler—and he was not examined as to any matter at issue except the origin of the two debts, and his testimony on this point sustains the answer rather than the bill. It must therefore be taken as true that the two debts did *not* arise out of the same transaction; that the assignment to Weed was for a valuable consideration, in good faith, and without notice of any right of set-off claimed by complainant. The whole equity of the bill fails. A decree can be made only according to both allegations and proofs, and in the present case what is alleged is not proved.

SEVENTH.

The equities of Weed as a purchaser in good faith and for value are superior to those of the complainant.

1. *They are prior in time.*

The purpose of the suit is to set-off judgments.

Such relief ought not to be granted if it will infringe on equities of equal or superior grade.

In Black on Judgments, section 954, it is said:

> "A considerable proportion of the authorities "take the broad ground that the right to set-off "judgments is permitted only where it will in- "fringe on no other right of equal grade, and "further, that an assignment of one of the judg- "ments destroys that mutuality which is an "essential condition to the right to set-off and "consequently that this equity will not be per- "mitted to affect an assignee for value and in good "faith."

The equitable title of defendant Weed and the Bank originated in October, 1893, when the one loaned its money and the other his credit on the faith of the claims which are now in judgment against the complainant. At this time there was of course no equity to set-off a judgment against the claims, for no judgment existed. The equitable title of Weed and the Bank to the claims against the Anglo-American, became a legal title in Weed on May 27, 1895, and passed into judgment in December, 1895, and at this time no equity to set-off *judgments* existed. If the equity of set-off be founded on the insolvency of the Davis Company then it did not come into existence until after Weed's equity had attached. There is nothing in the record to show insolvency of the Davis Company until

long after October, 1893 (p. 130). Insolvency creates no equity for a set-off as against an assignee unless it existed at the time of the assignment.

Henderson *vs.* McVay, 32 Ala., 471.

During the three years subsequent to the judgment against the complainant, Weed, as the owner of that judgment, held it free from any claim of set-off. It is true he was prevented by appeal from exercising his rights and collecting the judgment, but had any claim for set-off been then made based on the disputed and unliquidated debt in suit in Illinois it must have been denied.

Hendrickson *vs.* Hinckley, 17 How., 443.

How can it be claimed that the entry of judgment in Illinois in 1899 against the Davis Company operated to subject Weed's property—the New York judgment—to an equity from which it had been clear for at least three years? How can it be said that the delay of the New York court in disposing of the appeal operated to deprive Weed of the right of collecting his judgment? The maxim is that "the act of the law shall harm no one," and yet if it had not been for the delay of the Court Weed would have collected his New York judgment before the Illinois judgment, which is the foundation of the present suit, existed.

2. *The defendant, by its conduct with reference to its claims against the Davis Company, has waived the equity (if such equity ever existed) of setting them off against the claim and judgment assigned to Weed.*

(*a*) It declined to assert them as a counterclaim in the New York action, but prosecuted a cross-action upon them in Illinois.

It is true that at the time both actions were begun the Davis Company was solvent, and there was no special reason for asserting a set-off, but two years later, and while both actions were pending, the Davis Company became insolvent, and receivers were ap-

pointed in both states. The New York action was then pending on trial, and there was still time for complainant to have asserted a set-off had it so desired but it did not.

(*b*) It was guilty of laches in the prosecution of the Illinois action. That action was begun in November, 1893. It was at issue December 8, 1893 (p. 42). The condition of the court calendar in Chicago involved a delay of not more than two years between the bringing of an action and an opportunity to try it. The attorneys for the present complainant requested delay. They made default, and allowed the action to be dismissed. In short, no diligence whatever was shown, and while judgment might have been obtained in Illinois in December, 1895, it was delayed until January, 1899 (p. 42). The complainant allowed its Illinois action to slumber for over three years. During this time Weed was active in prosecuting his suit to judgment and in defending it on appeal. In so doing he necessarily incurred expense which he might not have done had he known that the dormant Illinois action could be used to deprive him of the fruits of his diligence. Had complainant obtained judgment in December, 1893, and then asserted a right to set-off, it would have presented a stronger equity. As it is, the defendants may well invoke the rule:

> " The party proposing to make the set-off must
> " use diligence and not delay until the interests of
> " third persons have intervened."
>
> Waterman on Set-off, sec. 373.

It is, of course, true that the title of defendant to this judgment was acquired before the time when, by ordinary diligence, complainant might have got judgment in its Illinois action; but defendants may well say that by incurring the expense of defending their own judgment on appeal, *after the time when complainant*

might have procured its judgment, they have acquired a new and intervening equity which is entitled to protection.

EIGHTH.

A several judgment cannot be used as a set-off against a joint judgment.

The judgment which complainant seeks to extinguish by set-off is a joint judgment against the complainant and Fowler Brothers, Limited. The judgment which it seeks to use as a set-off is a several judgment in favor of the Anglo-American alone. This is not allowed even in equity.

Story's Equity, sec. 1437.
Waterman on Set-off (2d ed.), sec. 416.
Dale *vs.* Cooke, 4 John Ch., 11.
Greene *vs.* Darling, 5 Mason, 201.
Howe *vs.* Sheppard, 2 Sumner, 409.
Gray *vs.* Rollo, 18 Wall, 629.

Waterman on Set-off states the rule briefly:

> "Sec. 416. Nor will courts of equity any more "than courts of law in general allow the set-off of "a joint debt against a separate debt or con- "versely of a separate debt against a joint debt."

It is true that when the set-off sought is strictly of judgments, the rule that the parties must be the same in each, is sometimes departed from. But this departure is peculiar to setting off judgments, and the right to vary from the general rule does not arise until the judgments are actually entered on each side.

Graves *vs.* Woodbury, 4 Hill, 559–561.

In the present case, as we have already shown, the judgments are not and never have been mutual, *i. e.*, for and against the same parties, and, considering the bill as one filed for a set-off of judgments, such set-off must be denied, as the property of the defendant,

Weed, cannot be taken to pay the debt of the Davis Company. It is only by going back of the judgments that any color can be found for the attempted set-off, and the debts which existed before the judgment, were the one joint and the other several. The complainant therefore cannot escape the operation of the general rule by invoking a doctrine peculiar to judgments, unless it concedes that its bill is framed to procure the set-off of judgments, and in that case it cannot succeed, as the judgments were never mutual.

NINTH.

There is no claim now existing in favor of the Anglo-American Company which is a valid set-off against the judgment held by defendant Weed.

It is a settled rule that no claim is available as a set-off unless it is one on which an action might be brought by the party claiming it at the time when and the place where he makes his claim.

Waterman on Set-off, sec. 66.
Cragin *vs.* Lovell, 88 N. Y., 258.
Dieffenbach *vs.* Roch, 112 N. Y., 621.

1. *The Illinois judgment is not such a claim.*

(*a*) The complainant so asserts in its bill of complaint (p. 3).

(*b*) It does not purport to run against defendants, Weed and the bank, and so it is not a cause of action against them.

(*c*) It did not exist at the time the cause of action was assigned to Weed, which has resulted in the judgment sought to be extinguished by set-off.

2. *The demand on which the Illinois judgment was recovered is not such a claim.*

(*a*) The bill of complaint does not proceed on any such theory, and relief can be granted only according to the allegations.

(*b*) It is merged in the judgment.

(*c*) If the judgment be disregarded it is barred by the statute of limitations. An outlawed claim cannot be used as a set-off (Waterman on Set-off, sec. 99). The judgment is not a new promise under section 395 of the Code. It may be treated as a new cause of action, but it cannot be used to defeat the bar of the statute as against the expired claim and then disregarded to avoid the merger of that claim.

TENTH.

The lien of the attorneys who procured and defended the New York judgment is paramount to any claim of set-off on the part of complainant.

By section 66 of the New York Code, attorneys have a lien on the cause of action they are retained to prosecute which attaches to the judgment or the proceeds thereof "in whosoever hands they may come." This lien is not confined to taxable costs, but extends to "compensation * * * governed by agreement express "or implied."

This lien is paramount to a set-off in favor of the adverse party.

Waterman on Set-off, sec. 389.

The evidence shows that the services of the attorneys in prosecuting the defendant's action against the Anglo-American and Fowler Brothers, including the appeals, were worth $7,500, and for this amount they have a lien. This lien on the judgment extends to all services rendered on the same retainer, *i. e.*, all services in connection with the matters in controversy between

the Davis Company and the Anglo-American. It is not confined to services in the action in which the judgment was recovered.

Re Paschal, 10 Wall, 483.

ELEVENTH.

The decree of the Circuit Court is right and should be affirmed with costs.

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